

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHNNY L. GIBBS,

Defendant-Appellant.

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UNPUBLISHED

May 11, 2001

No. 219713

Wayne Circuit Court

LC No. 98-008890

Before: White, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529; MSA 28.797, assault with intent to commit murder, MCL 750.83; MSA 28.878, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to concurrent terms of twenty-five to fifty years' imprisonment for the robbery conviction and life imprisonment for the assault conviction. Defendant also received the mandatory two-year term for the felony-firearm conviction, with this sentence to precede the others. Defendant appeals as of right. We affirm defendant's convictions, but remand for articulation of the reasons for sentence.

Defendant first argues that the trial court erred in denying his motion for a continuance to secure the presence of two alibi witnesses. We review a trial court's grant or denial of a continuance for an abuse of discretion. *People v Echavarria*, 233 Mich App 356, 368; 592 NW2d 737 (1999); *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification for the ruling made. *People v Stiller*, 242 Mich App 38, 54; 617 NW2d 697 (2000).

When deciding whether the trial court abused its discretion in denying a defendant's motion for a continuance, this Court considers whether the defendant (1) asserted a constitutional right, (2) had a legitimate reason for asserting the right, (3) had been negligent, and (4) had requested previous adjournments. *Lawton, supra* at 348. Defendant must also be able to demonstrate prejudice as a result of the trial court's abuse of discretion. *People v Pena*, 224 Mich App 650, 661; 569 NW2d 871 (1997), modified 457 Mich 885; 586 NW2d 925 (1998); *People v Paquette*, 214 Mich App 336, 344; 543 NW2d 342 (1995). After weighing the above factors, we find no abuse of discretion.

In the morning of the second day of the two-day trial, defense counsel notified the court that two of defendant's listed alibi witnesses were not present to testify. Defense counsel stated that both witnesses were served with subpoenas and were present in court the previous morning. Defense counsel excused them believing that their testimony would not be needed until the next morning. They left the courtroom after defense counsel explained that they were on "on-call status" and were expected to reappear the following morning. Defense counsel called them that night to advise them to appear at 9:00 a.m. One witness stated that she had a noon interview, and defense counsel assured her that she would be able to complete her testimony in time to make the appointment. However, neither witness appeared in court the morning of the second day. Defense counsel phoned their house and a third person answered. That person explained that one witness had to go to her job interview early, at 8:00 a.m., and the other witness "was out working on his car somewhere." They left the message that they could be in court 9:00 a.m. the following morning. Defense counsel requested that bench warrants be issued for both witnesses and that the court adjourn until 9:00 a.m. the following morning.

The trial court denied the request for a continuance until the next morning, concluding that it was not required to put the trial on hold for nearly twenty-four hours for the convenience of witnesses that were supposed to be in court that morning and simply chose not to appear. Significantly, the court explained that it would wait a reasonable time for counsel to present the witnesses, but would not adjourn the case an entire day. Counsel did not request that he be permitted to call the house again to seek more specific information regarding the witnesses' whereabouts and that an officer be dispatched to arrest them. Rather, he accepted the court's ruling that it would not grant a full day's adjournment. Under the circumstances, although defendant was advancing his constitutional right to call witnesses in his defense, we find no abuse of discretion in the court's offer to adjourn for a reasonable time, but not for a full day.

Defendant next raises several challenges to the trial court's instructions to the jury, none of which were asserted as timely objections at trial. This Court reviews unpreserved claims of error relating to jury instructions for plain error. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). To avoid forfeiture of his claims, defendant must demonstrate plain error that affected his substantial rights. *Id.*

Defendant's first challenge involves the trial court's instruction to the jury on the law of aiding and abetting. Specifically, defendant asserts that the trial court committed error requiring reversal when it instructed the jury that defendant may be found guilty on an aiding and abetting theory if the criminal act was foreseeable.

We review jury instructions in their entirety to determine whether the trial court committed error requiring reversal. *People v Mass*, 238 Mich App 333, 339; 605 NW2d 322 (1999), lv gtd on other grounds 462 Mich 877 (2000). A trial court must instruct the jury concerning the law applicable to the case in an understandable manner. *People v Henry*, 239 Mich App 140, 151; 607 NW2d 767 (1999). Even where the trial court's instructions are somewhat imperfect, there is no error if the instructions, taken as a whole, fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id.*

Our review of the jury instructions leads us to conclude that while the trial court's instructions on aiding and abetting included language that erroneously expanded the concept of

aiding and abetting, reversal is not warranted because there was no real issue of defendant's being an aider and abettor, as opposed to a principal. The real issue was whether defendant was present at all. We conclude that the unobjected-to language did not affect defendant's substantial rights.

Defendant next contends that the trial court erred by failing to instruct the jury that its verdict on all three counts must be unanimous. Criminal defendants are guaranteed the right to a unanimous verdict under the Michigan Constitution. *People v Gadomski*, 232 Mich App 24, 30; 592 NW2d 75 (1998); *People v Quinn*, 219 Mich App 571, 576; 557 NW2d 151 (1996); Const 1963, art 1, § 14. To protect a defendant's right to a unanimous verdict, it is the duty of the trial court to properly instruct the jury regarding the unanimity requirement. *People v Smielewski*, 235 Mich App 196, 201; 596 NW2d 636 (1999), citing *People v Cooks*, 446 Mich 503, 511; 521 NW2d 275 (1994).

In our view, the trial court properly protected defendant's right to a unanimous verdict by instructing the jury that the verdict on all three counts must be unanimous. The trial court's use of the word "decide" rather than "agree" is not grounds for reversal where the jury was polled and each member clearly indicated agreement with the verdicts on all three counts. Where the trial court instructs the jury regarding the requirement of unanimity, and a unanimous verdict is returned, the defendant's rights have not been violated. *People v Johnson*, 187 Mich App 621, 630; 468 NW2d 307 (1991).

Defendant next argues that the trial court further erred in its instructions on the offense of felony-firearm because it failed to specifically define the term firearm. We disagree.

To prove the offense of felony-firearm, the prosecution must prove that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999); *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). A firearm is defined as any weapon from which a dangerous projectile may be propelled by using explosives, gas, or air as a means of propulsion. *People v Brooks*, 135 Mich App 193, 195; 353 NW2d 118 (1984).

It is not incumbent on a trial court to define the term "firearm" in a felony-firearm instruction where there has been no dispute that the object in question is a firearm. *People v Hunt*, 120 Mich App 736, 742; 327 NW2d 547 (1982). In the instant case, it was undisputed that the victim suffered a gunshot wound to the pelvic region after her struggle with defendant. Furthermore, although the definition of firearm is included in CJI2d 11.34(7), the use of these instructions is not mandatory. *People v Stephan*, 241 Mich App 482, 495 n 10; 616 NW2d 188 (2000). Consequently, there was no error.

In his supplemental brief, defendant asserts that he was denied the effective assistance of counsel because counsel failed to object to the claimed errors relating to the aiding and abetting and felony-firearm instructions. To demonstrate ineffective assistance of counsel, the defendant bears the burden of showing that counsel's performance was deficient, and that he suffered prejudice as a result. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). Defendant has not met his burden of showing prejudice.

Defendant also contends that the trial court improperly commented on the evidence when instructing the jury. Our Legislature has vested trial courts with the discretion to “. . . make such comment on the evidence, the testimony and character of any witnesses, as in his opinion the interests of justice may require.” MCL 768.29; MSA 28.1052; *People v Ward*, 381 Mich 624, 628; 166 NW2d 451 (1969). A trial court pierces the veil of impartiality in a manner that requires reversal when its comments are of a nature that unduly influence the jury and thereby deprive a defendant of his right to a fair trial. *People v Hampton*, 237 Mich App 143, 155; 603 NW2d 270 (1999); *People v Johnson*, 174 Mich App 108, 114; 435 NW2d 465 (1989). After a review of the record, we conclude that the trial court’s statement regarding the victim’s testimony was a proper comment on the undisputed evidence adduced at trial.

Finally, defendant asserts that the remand to the trial court is required because the trial court did not articulate its reasons for sentencing on the record. We agree.

To facilitate appellate review of sentences, a sentencing court is required to articulate on the record the criteria it considered and the reasons for the sentence imposed. *People v Fleming*, 428 Mich 408, 411; 410 NW2d 266 (1987). Where the trial court fails to properly articulate its reasoning for sentencing on the record, this Court should remand for articulation of the reasons for sentence. *People v Triplett*, 432 Mich 568, 573; 442 NW2d 622 (1989). Because the trial court did not articulate its reasons when imposing sentence, remand for articulation of reasons is required.

We affirm defendant’s convictions, but remand for articulation of the reasons for sentence. We do not retain jurisdiction.

/s/ Helene N. White  
/s/ Kurtis T. Wilder  
/s/ Brian K. Zahra